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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS A. BISKUP,

Petitioner,

V.

GARY McCAUGHTRY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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85 pp

QUESTIONS PRESENTED

1. Whether there is a split in the circuits regarding the standards for admissibility of hypnotically induced or refreshed testimony.

2. Whether the petitioner's due process rights were violated by convicting him of injury by conduct regardless of life without sufficient evidence of the requisite mental intent.

3. Whether the petitioner was denied his due process rights because of the state trial court's failure to sever the burglary charges from the physical injury charges.

4. Whether the petitioner was denied his due process rights because of prosecutorial delay.

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THOMAS A. BISKUP,

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PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Petitioner, Thomas Biskup, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 21, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 20 F.3d 245 (7th Cir. 1994). The opinion appears in the Appendix at A-3.

The district court opinion appears in the Appendix at A-52.

JURISDICTION

The judgment sought to be reviewed is dated September 21, 1995. That is the date that the Petition for Rehearing and Suggestion for Rehearing In Banc was denied by the Seventh Circuit Court of Appeals. A-1. This court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

I. Fourteenth Amendment, U.S. Constitution, (excerpt).

"...Nor shall any state deprive any person of life, liberty or property,

without due process of law."

STATEMENT OF THE CASE

The petitioner was tried on numerous criminal counts by a jury on March 27 through March 31, 1989. The most serious charge against the petitioner was attempted first degree murder, aggravated battery and injury by conduct regardless of life. These charges all stemmed from the allegation that the petitioner pushed his wife into the path of a speeding car because she had threatened to divorce him and take custody of their child. The petitioner was also tried on several counts of burglary.

The jury returned verdicts of guilty on seven of the twelve counts before it. The petitioner was found guilty of intermediate battery, injury by conduct regardless of life, and burglary, all party to a crime, along with four

additional burglaries. On May 22, 1989, the petitioner was sentenced to two years imprisonment on the intermediate battery conviction and ten years imprisonment on both the injury by conduct regardless of life conviction and burglary party to a crime conviction. All sentences were to be served consecutively for a total of 22 years. On the remaining burglaries, the petitioner was sentenced to 10 years probation consecutive to his prison term. Also, the petitioner was ordered to pay restitution. On July 18, 1990, the Wisconsin Court of Appeals District II, affirmed the decision in an unpublished opinion. On October 23, 1990, the Wisconsin Supreme Court denied a Petition for Review.

On November 8, 1991, the petitioner filed a Petition for Writ of Habeas Corpus. On July 6, 1993, the district

court by the Honorable Senior Judge John W. Reynolds, issued a judgment denying the petitioner's Petition for Writ of Habeas Corpus. On July 19, 1993, the appellant moved the district court for issuance of a Certificate of Probable Cause which certificate was issued on July 26, 1993. On August 4, 1993, the petitioner filed a Notice of Appeal.

In a Decision issued March 23, 1994, the Seventh Circuit Court of Appeals affirmed the district court's denial of the Writ of Habeas Corpus. On April 6, 1994, the petitioner filed a Petition for Rehearing and Suggestion for Rehearing In Banc. The Petition for Rehearing was denied without opinion by the Seventh Circuit Court of Appeals on September 21, 1995.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT IN THE CIRCUITS REGARDING THE CRITERIA FOR ADMISSIBILITY OF HYPNOTICALLY INDUCED OR REFRESHED TESTIMONY.

The facts in the instant case regarding the issue of hypnotically induced/refreshed testimony is analogous to United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984), wherein the fifth circuit held that when a hypnotized subject identifies, for the first time, a person he has reason to note is already under suspicion, the post hypnotic testimony is inadmissible regardless of whatever procedural safeguards were used to attempt to sanitize the hypnotic session. Valdez, 722 F.2d at 1203. In the instant case, the petitioner's wife knew that the petitioner was suspected of causing her accident. The suspicion was fostered

primarily by one of the investigating officers who first approached petitioner's wife with his hunch within four days of her accident. Subsequently, knowing that the petitioner was "suspected" of causing her accident, when she was hypnotized, petitioner's wife recalled being pushed twice.

Notwithstanding the similarity in facts, the Seventh Circuit, contrary to the Fifth Circuit, will allow hypnotically refreshed/induced testimony even after it is clear that the hypnotized person is first accusing the defendant only after she has become suspicious of the defendant. This places the Seventh Circuit Court of Appeals in direct conflict with the Fifth Circuit Court of Appeals with regard to the proper standards to judge admissibility of hypnotically refreshed/induced testimony.

Not only that, the evidence of record shows that the hypnotist asked the highly suggestive question "is he pushing you" just prior to the petitioner's wife's "remembering" that she was pushed by the petitioner.

In addition to this highly suggestive remark made by a witness with animus toward the petitioner, numerous guidelines to ensure against even unintended suggestion recognized by the Seventh Circuit Court of Appeals in United States v. Kimberlin, 805 F.2d 210, 218-219 (7th Cir. 1986) were violated. The hypnotist in the instant case was a social worker rather than a psychiatrist or psychologist; a detailed pre-hypnosis interview was not done or written down; not all of the contacts between the hypnotist and the subject were recorded; and another individual (petitioner's

wife's mother) was present during the hypnosis. This violated most of the guidelines recognized in Kimberlin, 805 F.2d at 218-219.

Like the situation in Valdez, supra, the damaging testimony here was developed for the first time during the hypnotic session. With those factors in mind, the court in Valdez concluded that the testimony was inadmissible. Valdez, 722 F.2d at 1203-04.

Petitioner's wife's divorce and custody proceedings, like the officers' "rancor" in Valdez gave her cause for what is known as "confabulation".

> Confabulation has been defined as 'fill[ing] in those aspects which the individual cannot remember in an effort to comply with the suggestions of the hypnotist'. ...Confabulation

> causes occasional memory distortion, shear fantasy and wilful lies or a mixture of fact and fantasy.

United States v. Kimberlin, 805 F.2d 210, 218 (7th Cir. 1986).

Unlike Valdez, the hypnotist made a direct suggestion concerning the most critical aspect of the refreshed testimony -- that the petitioner pushed her. Moreover, there is much more corroboration for the hypnotically refreshed testimony in Valdez than there was in the instant case.

The decision in the instant case is also at odds with findings in the 8th and 10th Circuit Courts of Appeals which have found constitutional violations where guidelines for testimony enhanced by hypnosis were not followed. See Williams v. Armontrout, 877 F.2d 1376, 1380-81 (8th

Cir. 1989); Tuttle v. State of Utah, 57 F.3d 879, 887-88 (10th Cir. 1995) [both cases affirmed on the grounds that the Constitutional errors were harmless].

Because there is still clear and apparent conflict and confusion among the circuits about what the proper standards should be for the admissibility of hypnotically refreshed/induced testimony, this court should grant the Petition for Writ of Certiorari.

II. THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY CONVICTING HIM OF INJURY BY CONDUCT REGARDLESS OF LIFE WITHOUT EVIDENCE OF THE REQUISITE MENTAL INTENT.

In Wisconsin, a conviction of injury by conduct regardless of life requires that, inter alia that the defendant's conduct was of such character that it "evinces a depraved mind". Wis. JI Crim.

1250 (1986). A failure of sufficient proof to sustain a conviction beyond a reasonable doubt violates the petitioner's Fourteenth Amendment due process rights. Jackson v. Virginia, 443 U.S. 307, 316 (1979).

However, the petitioner was also tried on the count of aggravated battery. Aggravated battery requires a mental state that petitioner had the intent to cause great bodily harm to his wife. The petitioner was convicted of a lesser included offense of intermediate battery which has, as its mental state, the intent to simply cause bodily harm. In past Wisconsin caselaw, the definition of acting with a "depraved mind" was defined as,

> When the conduct causing injury demonstrates an utter lack of concern for the life and safety

of another and for which conduct there is no justification or excuse.

Wis. JI Crim. 1250. See also, Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331, 340 (1977).

It is impossible to reconcile the jury's finding that the petitioner did not intend to cause great bodily harm to his wife with a finding that his conduct was "devoid of regard for the life of another". The jury's acquittal on aggravated battery amounts to a finding that the petitioner had to have had at least some regard for life, thus negating a necessary element for the conviction of injury by conduct regardless of life. Therefore, because the petitioner was convicted without sufficient evidence of one of the requisite elements of the offense, his due process rights were

violated.

III. THE TRIAL COURT'S FAILURE TO SEVER THE BURGLARY CHARGES FROM THE PHYSICAL INJURY CHARGES DENIED THE PETITIONER HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

The petitioner was charged with and forced to defend twelve distinct charges at trial. The issue before this court is not only whether there was misjoinder (or a failure to sever) but whether that misjoinder resulted in denying the petitioner his right to a fair trial. See United States v. Lane, 447 U.S. 438, 446 n.8, 106 S.Ct. 725, 730 n.8 (1986).

The evidence of burglary charges against the petitioner would not have been admitted separately at the trial of the physical injury to the petitioner's wife. There was specific prejudice in this error by the court which denied the petitioner

his right to a fair trial. Petitioner was forced to defend twelve counts in a single trial, many of the counts separated by years of time. The petitioner had to examine 33 witnesses and explain over 40 exhibits in one trial using different theories of defense for each. The dangers of accumulation of the evidence and confusion of the jury are self-evident. The admission of evidence regarding the petitioner's actions leading to his wife's injuries was bound to make it more difficult to a jury to reasonably and dispassionately review the evidence of the burglary counts. Trying the numerous counts together rendered the petitioner's trial fundamentally unfair and that is a violation of due process. See Willard v. Pearson, 823 F.2d 1141 (7th Cir. 1987).

IV. THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF

LAW BECAUSE OF PROSECUTORIAL DELAY IN THE CHARGING OF THE BURGLARY COUNTS.

Detective Richard Ladwig of the Walworth County Sheriff's Department was the chief investigating officer regarding the burglary counts petitioner was charged with. The detective agreed that as of the summer of 1985 there was a "prosecutable case" against the petitioner for those burglaries. However, the detective stated that it was "mutually agreed" between himself and the District Attorney's Office that there was a tactical advantage in putting together a case involving the property and injury charges.

The district court held that in order for their to be a due process violation, the petitioner had to demonstrate both:

> (1) That the government delayed bringing the indictment in order to gain a tactical advantage;

and

(2) That the delay caused him actual and substantial prejudice.

A-70.

The supervising detective admitted that the indictment was gained to provide a tactical advantage. Moreover, the petitioner suffered substantial prejudice in that potential witnesses had died and certain calendars (for an alibi defense) had been lost in the years since the burglaries (1982 and 1983). Not only that, the trial court made the finding that the petitioner had suffered "some actual prejudice by delay". See Appendix at A-71.

However, the Seventh Circuit Court of Appeals decision simply ignores the fact that the petitioner has demonstrated both prongs of the necessary test and has in

fact demonstrated a constitutional violation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 21, 1995

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. ALLEN SHARP, Chief Judge*

THOMAS A. BISKUP,

Petitioner-Appellant,

	)	Appeal from the United
No. 93-2895	)	States District Court
v.	)	for the Eastern
	)	District of Wisconsin
	)	
	)	No. 91-C-1205
	)	John W. Reynolds,

* Honorable Allen Sharp, Chief Judge, United States District Court for the Northern District of Indiana, sitting by designation.

) Judge.

GARY MCCAUGHTRY,

Respondent-Appellee.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by petitioner-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 93-2895

Thomas A. Biskup,

Appellant,

v.

Gary McCaughtry,

Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 91 C 1205-John W. Reynolds, Senior District Judge.

ARGUED JANUARY 11, 1994-

DECIDED MARCH 23, 1994

Before CUDAHY and FLAUM, Circuit Judges, and SHARP, District Judge.*

I.

SHARP, District Judge. The appellant, Thomas A. Biskup, was on March 17, 1988, charged with a multi-count criminal complaint with attempted first-degree murder, aggravated battery, injury by conduct regardless of life, attempted arson, attempted intimidation of a witness, two counts of theft of a firearm, and nine counts of burglary.

The case went through procedural preliminaries, including a three-day preliminary examination in April, 1988, in the state court for Walworth County, State of Wisconsin. At the preliminary examination, appellant was bound over on

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* The Honorable Allen Sharp, Chief Judge, United States District Court for the Northern District of Indiana, sitting by designation.

all counts except the attempted first-degree murder. A trial by jury was had in that Wisconsin state court in March, 1989, and it returned a verdict of guilty on seven of the twelve counts before it. Appellant was found guilty of injury by conduct regardless of life, intermediate battery, and five counts of burglary. He was sentenced to two years imprisonment on the intermediate battery conviction, and to 10 years imprisonment on both the injury by conduct regardless of live and burglary, party to crime conviction, all sentences to be served consecutively, for a total of 22 years. On the remaining four burglaries, he was sentenced to 10 years probation consecutive prison term and was ordered to pay restitution.

District 2 of the Wisconsin Court of Appeals affirmed the aforesaid convictions and sentences in an unpublished decision.

The Wisconsin Supreme court denied review. A petition for relief under 28 U.S.C. § 2254 was filed in the United States District Court for the Eastern District of Wisconsin and denied. The district judge issued a certificate of probable cause, and this appeal followed.

The issues raised before the district court were that the state trial court erred when it refused to sever counts; it erred in admitting hypnotically refreshed testimony; prosecutorial delay; and insufficient evidence.[1] The district court denied relief on all of these assertions.

It is elementary that the district court, under § 2254, must focus on alleged violations of the federal constitution,

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[1] No argument is advanced as to inconsistent or irreconcilable jury verdicts. *See United States v. Walker*, 9 F.3d 1245, 1248 (7th Cir. 1993).

laws and treaties. *See Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988), *cert. den.*, 489 U.S. 1088 (1989). It is also elementary that the federal question jurisdiction of the district court under § 2254 cannot be invoked simply to require state officials to comply with state law or to review alleged violations of state law. That concept was pointedly and recently made by Judge Bauer in *Stephens v. Miller*, No. 91-1690 (7th Cir. January 6, 1994) en banc, as follows:

> Stephens' first contention need not detain us long. He argues that we should grant his petition because the Indiana trial court and the Indiana Supreme Court misapplied the Indiana Rape Shield Statue under Indiana law. That may be, but whether the Indiana courts correctly applied their own law is, by itself, no concern of

> ours. Federal habeas actions do not lie for mere errors of state laws. We ask only whether Indiana denied Stephens his rights under the Constitution, laws or treaties of the United States. We therefore will not consider the merits of his claim that the Indiana courts misapplied their own law.

Stephens, slip op. at p.5 (cites omitted). *See also Jenkins v. Gramley*, 8 F.3d 505 (7th Cir. 1993).

II.

The question with regard to the sufficiency of the evidence requires the district court to examine the evidence in the state record as to whether a reasonable trier of fact, in this case a state court jury, would find this petitioner guilty beyond a reasonable doubt of the various crimes of which he

was convicted in the state trial court in Wisconsin. The relevant formulation is in *Jackson v. Virginia*, 443 U.S. 307 (1979). Justice Stewart, speaking for the Supreme Court of the United States in *Jackson*, 443 U.S. 307 (1979), stated:

> A judgement by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as is any judgment affirming a criminal conviction. But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state

> postconviction remedies to redress possible error. See 28 U.S.C. § 2254(b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur-reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of a criminal sanction is simply not to be achieved at the expense of a constitutional right-is not one that can be so lightly abjured.

Id. at 323. The Supreme Court in *Jackson* held:

> We hold that in a challenge to a conviction brought under 28 U.S.C. § 2254-if the settled procedural

> prerequisites for such a claim have otherwise been satisfied-the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.

Id. (footnote omitted). *See also Sumner v. Mata*, 449 U.S. 539 (1981); *Dooley v. Duckworth*, 832 F.2d 445 (7th Cir. 1987), *cert. den.*, 485 U.S. 967 (1988); *United States ex rel. Haywood v. O'Leary*, 827 F.2d 52 (7th Cir. 1987); *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir. 1987); *cert. den.*, 484 U.S. 867 (1987); *Shepard v. Lane*, 818 F.2d 615 (7th Cir.), *cert. den.*, 484 U.S. 929 (1987); and *Perri v. Director, Department of Corrections*, 817 F.2d 448 (7th Cir.), *cert. den.*, 484 U.S. 843 (1987).

A review of the record in the light favorable to the prosecution convinces the court that a rational trier of fact could readily have found the petitioner guilty beyond a reasonable doubt of the crimes for which he there stands convicted.

Following *Jackson, supra,* there is an increasingly long line of cases in this circuit which suggest that the facts found by the state courts are presumed correct. *See Andersen v. Thieret,* 903 F.2d 526, 531 (7th Cir. 1990). The statement of facts found in the unpublished opinion in District 2 of the Court of Appeals of Wisconsin are as follows:

> On the evening of April 7, 1984, Biskup's wife, Suzanne, was rendered a permanent paraplegic by a hit-and-run driver as she was walking on the shoulder of County Trunk H with Biskup. On March 17, 1988, the state

issued a criminal complaint charging Biskup with party to the crimes of attempted first-degree murder, aggravated battery, and injury by conduct regardless of life in connection with this incident. The state alleged that Biskup had conspired with his friend Craig Kolz to "scare" Suzanne into keeping quiet about several burglaries Biskup had committed prior to 1984. The alleged plan called for Biskup to arrange for Suzanne to walk along the edge of the highway while Kolz would drive by and "nick" or "brush" her.

The same criminal complaint also charged Biskup with attempted arson, attempted intimidation of a witness, two counts of theft of a firearm, and nine counts of burglary. Following a preliminary examination, Biskup was

bound over for trial on all counts except attempted first-degree murder. Biskup then moved to sever the property counts from the other charges, to suppress Suzanne's hypnotically refreshed recollection, to dismiss the property crimes due to prosecutorial delay, and to dismiss the injury by conduct regardless of life and battery charges due to multiplicity. The trial court denied the motions.

The case was tried to a jury. Suzanne testified that on the morning of April 7, 1984, she told Biskup she wanted a divorce and custody of their only child; when Biskup refused, she threatened to turn him in for several burglaries he had committed. Biskup testified that this conversation never took place and that he and

Suzanne were not contemplating divorce.

That afternoon, Kolz visited the Biskup house, Kolz testified that at this meeting Biskup asked him to carry out the plan to "scare" Suzanne. Biskup denied the existence of any such plan.

Around 9:30 that evening, Suzanne and Biskup went to get hamburgers. The restaurant was under construction, with nails and boards on the ground. Suzanne testified that on the way home, Biskup pulled off the road twice because he thought there was something wrong with the truck; when Biskup returned to the truck the second time Suzanne heard a hissing sound; they proceeded a short distance, but the truck started shaking and they had to stop a third

time. The truck had a flat tire. Suzanne and Biskup were walking along the shoulder of the highway to find a telephone when Kolz drove by and struck Suzanne with this car. Suzanne's hypnotically-affected testimony was admitted into evidence, wherein she stated that Biskup pushed her immediately before she was hit by the car.

Under 28 U.S.C. § 2254(d), the district court exercising jurisdiction under § 2254 may presume the facts as found by the second highest court in Wisconsin as correct.

III.

Notwithstanding the basic dimensions of collateral review under § 2254, this petitioner is hard pressed to find a constitutional violation in the Wisconsin state trial court's action in denying a

severance, especially in view of the provisions of Wisconsin statute § 971.12(1), which states:

> Crimes may be charged and tried together if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Section 971.12(1), Stats.

See also *State v. Bettinger,* 100 Wis.2d 691, 698, 303 N.W.2d 585, 589 (1981). The standard for the district court under § 2254 is that an improper joinder constitutes a federal constitutional violation only if the prejudice was so great as to deny a fair trial. *See Leach v. Colb,* 911 F.2d 1249, 1258 (7th Cir.), *cert. den.,* 498 U.S. 972 (1990). The state prosecutor's theory was that the

property crimes are the motive for the assault on Suzanne, and that the assault demonstrates a consciousness of guilty of the property crimes. The state trial court ruled that an insufficient showing of actual prejudice had not been made in regard to joinder. The district court made a parallel finding with regard to alleged constitutional error of such joinder. A careful examination of the record discloses that the district court was correct.

It needs to be remembered that neither the district court nor this court have seen or heard this petitioner and others who testified before this Wisconsin state court jury. The state record may be examined in a light favorable to the jury verdict. The appellant and his wife, Suzanne, were married on January 22, 1983, and have a daughter. Slightly more than a

year later, Suzanne was hit by a car driven by Craig Kolz, a friend of the appellant, and she is now paralyzed from the chest down. This jury had before it widely varying explanations of this event and the jury's verdicts should not be disturbed unless some provision of the constitution, laws or treaties of the United States require it.

The jury saw Suzanne and heard her testify that her marriage with the appellant had deteriorated "beyond repair," and that she was planning to leave him. On the morning of April 7, 1984, she and the appellant drove to a wooded area where she told him she wanted a divorce and the custody of their daughter. She told him that she no longer wanted to live in his parents' house. He said he would not give her custody of the child. Suzanne threatened to turn him in

for burglary he had committed some years before. The appellant asserted that Suzanne would not follow through on her threat because she was also involved in some of the burglaries. (Suzanne had discussed the burglaries with police authorities in August, 1984.)

Later on the same day, Craig Kolz worked with the appellant on the lawn mower in the appellant's garage and afterward the three of them, appellant, Suzanne and Kolz, played scrabble and drank wine. At around 7:00 p.m., Suzanne took a nap and was awakened by the appellant at around 9:00 p.m. to go to a Burger King. She initially declined, being tired, but then went anyway. On the ride home, the appellant got out twice to check the truck because he said it did not feel right. She did not notice anything wrong with the truck. The appellant got

back into the truck the second time. she heard a loud hissing sound. The appellant said that the tire looked like it was going flat, but that he would try to go further. He drove 50 feet before he had to pull over because the truck was shaking. The appellant and his wife began walking along a two-lane gravel highway. The appellant was having trouble breathing because of his asthma, and an argument ensued. She started to walk in front of the appellant, and he pushed her in the shoulder. She moved on away from him and he caught up with her and pushed her again. The next thing that Suzanne remembered was being hurt, lying in a ditch, and then being taken to the hospital. She was unconscious for a few days, and was in the hospital for four months.

The appellant, testifying on his own behalf, attempted to put something of a different spin on these events. He admitted going to the Burger King with Suzanne and the incidents of the vibrating truck on the way home. He says that he told Suzanne that there was a flat tire and they walked toward home. He claims they were talking and laughing. He says that there was a loud bang, a cloud of dust and Suzanne disappeared. He says that he ran for help, shouting that a white car had hit Suzanne. The first place he came to was a bar, where some people had gathered because of the accident. He says that a woman told him that his wife had been hurt badly. He says that he went to the police and to the hospital, picked up his truck and went home, not seeing Suzanne until the next day. He claims that he did not learned

about Suzanne's intent to file for a divorce until he heard it in July, 1984, from a nurse at the hospital.

The third key witness in this case was Kolz. He was first charged with hit and run, granted immunity to testify against the appellant, and that charge dismissed upon his testifying against the appellant. Kolz testified that the appellant asked him to hit Suzanne with his car. He explained that on April 7, he initially went to the appellant's house around noon to work on a lawn mower, and then returned again about 5:00 p.m. At that time, appellant told Kolz that Suzanne wanted a divorce, and that he would not let her have custody of their child. He also told Kolz that Suzanne had threatened to turn him in for burglary. The appellant then told Kolz that he wanted to do something to change Suzanne's

mind about the divorce. The appellant told Kolz that he, the appellant, would take Suzanne out to dinner, get a flat tire, walk for help, and that Kolz should hit Suzanne with his car. The appellant offered Kolz $12,000 of his aunt's inheritance and a car. The record discloses a vigorous cross-examination of Kolz, especially in regard to possible inconsistencies about the question of money. Kolz further testified that the appellant was insistent, and that the appellant asked him to "nick" Suzanne with the car. Kolz left, parked by the road where the appellant said he would be traveling, drank a quart of beer and waited for the appellant's truck to go by. Kolz said he was drunk and when he saw the appellant's parked truck, he passed appellant and Suzanne who were walking along the road and turned around and drove

back, hitting Suzanne while he was driving 40 to 45 miles per hour. The jury as a trier of fact was able to hear, see and evaluate the three participants of these events in this case which occurred on April 7, 1984.

Here, the appellant launches a frontal assault on the credibility of Craig Kolz. Credibility was thoroughly aired before the jury in the state trial court. It is generally improper for a federal district court or this court exercising jurisdiction under § 2254 to superimpose its views of credibility on a witness that it has neither seen or heard. The same is true here.

The district court gave short shrift to the argument about insufficiency of evidence under *Jackson v. Virginia,* and there is no question of its constitutional sufficiency. Certainly, that evidence can

be considered in the light favorable to the jury's verdict. *See United States v. Goines,* 988 F.2d 750 (7th Cir. 1993).

IV.

With reference to the criminal charges of the 1982 burglaries, the appellant attempts an argument regarding prejudicial delay under *United States v. Marion,* 404 U.S. 307 (1971). The charges with regard to those four 1982 burglaries were within the relevant six-year Wisconsin statute of limitations. The appellant must make some species of an actual prejudice argument. *See United States v. Gouveia,* 467 U.S. 180, 192 (1984). The appellant attempted to make some argument before the Wisconsin state trial court with regard to loss of family calendars which might verify his whereabouts, as well as that of a deceased aunt who might be able to provide an

alibi. The state trial judge who saw and heard this appellant found otherwise, and specifically rejected the credibility of the appellant in this regard. There is no doubt that deference must be given to a state trial court's determination of credibility under *United States v. Carter*, 910 F.2d 1524, 1529 (7th Cir. 1990), *cert. den.*, 111 S.Ct. 1628 (1991). Additionally, the state trial court had specific testimony from law enforcement officers and the district attorney with regard to the quantity of evidence that they had to prosecute these burglaries in 1985. The district attorney opined that it was not sufficient then, but was made sufficient by the key testimony of Suzanne later. Under *United States v. Lovasco*, 431 U.S. 783 (1977), a state prosecutor, acting within the statute of limitations, may wait to build a stronger case. The

Wisconsin Court of Appeals analyzed the charge of prosecutorial delay under state law principles and failed to find prejudicial delay. The district court analyzed the issue under *Marion, Gouveia* and *Lovasco*, and failed to find any constitutional error in the state trial court's decision. Recent progeny of those three Supreme Court decisions in this circuit fully support that decision. *See Pharm v. Hatcher,* 984 F.2d 783, 785-86 (7th Cir. 1993) (although the Wisconsin courts hold that the Sixth Amendment right to a speedy trial arises at the time of a criminal complaint, under *Marion,* 404 U.S. 307, the federal rule is that the speedy trial clock does not begin to tick until after the information or indictment); *Wilson v. McCaughtry,* 994 F.2d 1228, 1233 (7th Cir. 1993) (*quoting Lovasco,* 431 U.S. 783, "only the most egregious pre-

indictment government delay-that which transgresses fundamental conceptions of justice...-is proscribed by the constitution"); *Wilson,* 994 F.2d at 1234 fn.5 ("*Gouveia* would be powerful support for adopting a requirement that defendants show actual prejudice cause by a purposeful, tactical delay by the prosecution.")

V.

The most important, and indeed only truly troubling issue in this case has to do with the failure of the state trial court to suppress Suzanne's hypnotically refreshed testimony. After the accident, she gave vague statements to the police as to what transpired immediately before she was struck. Afterward, she independently decided to undergo hypnosis in an effort to recall more clearly the events surrounding the accident. There is no

evidence that that decision was prosecutorially induced. After that hypnotic session, she was able to recall that she and the appellant were arguing about the custody of their child as they walked along the highway, that she took off running, that appellant punched her in the arm, but she ran again and then appellant caught up with her and pushed her immediately before she was hit by the Kolz car.

Given the counts in which the appellant was found guilty, with reference to the incident on April 7, 1984, under *Jackson v. Virginia,* the evidence of Kolz alone would support the conviction on those counts. To be sure, in *State v. Armstrong,* 110 Wis.2d 555, 571-72, n.23, 329 N.W.2d 386, 394-94, n.23, *cert. den.,* 461 U.S. 946 (1983), the Supreme Court of Wisconsin has asserted that evidence

offered by witness who has had a hypnotic experience does not constitute a *per se* violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court decision in *Rock v. Arkansas,* 483 U.S. 44 (1987), deserves careful attention here. The Supreme Court of Arkansas created and then enforced a rule of evidence applicable in criminal cases which prohibited a criminal defendant from making affirmative use of that defendant's hypnotically-refreshed recollection. The Supreme Court of the United States granted certiorari from the Supreme Court of Arkansas to determine whether or not that state-created prohibition violated the due process clause of the Fourteenth Amendment of the Constitution of the United States. A closely-divided 5 to 4 decision held that

such state-created inhibition on hypnotically-refreshed testimony proffered by a defendant in a criminal case did indeed violate the due process clause of the Fourteenth Amendment. Chief Justice Rehnquist for himself, Justices White, O'Connor, and Scalia expressed serious concerns regarding federalism, opining that the due process clause should not be used to prohibit Arkansas from developing its own approach to this important evidentiary issue. The majority opinion of Justice Blackmun in *Rock* deserves even closer attention here. It is there implicit, if not explicit, that no *per se* rule exists which forecloses the proffer of hypnotically-refreshed testimony by a defendant in a criminal case. In other words, the due process clause permits a defendant in a criminal case to use hypnotically-refreshed testimony as a

defensive shield. The question which is not explicitly answered in *Rock* is whether the prosecution can use that species of testimony with reference to a witness against a defendant in a criminal prosecution as a prosecutorial sword. The answer to that question is not uniform throughout the nation or even the federal judiciary. Many state jurisdictions indeed have a *per se* rule. *See* 77 A.L.R. 4th 943. Some cases in the federal system have followed a *per se* rule, as it is readily apparent as the dissent in *Rock* well stated, there are deep concerns with regard to suggestiveness. Judicial guidelines have been established in this circuit and elsewhere which attempt to accommodate this particular evidentiary phenomenon. This circuit has done so in *United States v. Kimberlin,* 805 F.2d 210 (7th Cir. 1986), and the tack taken there

was similar to that of the Supreme Court of Wisconsin in *Armstrong*.

The long and short of this discussion is that there is no *per se* rule bottomed in the due process clause of the Fourteenth Amendment. Under state law, the Court of Appeals of Wisconsin held that the state trial judge in Wisconsin did not violate the procedures enunciated by the highest court in Wisconsin. This court must examine the record with a focus on whether there is a violation of the Constitution of the United States, laws or treaties. *See Bell v. Duckworth,* 861 F.2d 169 (7th Cir. 1988), *cert. den.*, 489 U.S. 1088 (1989).

McCormick on Evidence, §206 (E. Cleary, 3d ed. 1984) helps put the hypnosis evidence problem in context.

> Although the scientific study of hypnosis began over 200 years ago, a

single, satisfactory explanation of the phenomenon has yet to emerge. The scientific studies do make it clear, however, that people who are hypnotized or given so-called "truth serums" do not always tell the truth. On the other hand, the most directly pertinent studies do suggest that in certain circumstances hypnosis can enhance memory. The problem is that it also appears that it can alter memory. Hypnotized persons are highly suggestible, and some authorities believe that when a hypnotist encourages a subjective to relate everything he can possibly remember, the subject produces fragments and approximations of memory in an effort to be cooperative. In addition, the subject may accept as his own

recollections distortions inadvertently suggested by the hypnotist. Finally, the hypnotic session may reinforce the witness' confidence in erroneous memories.

Forensic applications of hypnosis can generate a variety of constitutional and evidentiary issues. A party may seek admission of statements a witness made while under hypnosis or narcoanalysis to show directly the existence of certain facts, to impeach or buttress credibility, or to show the basis for a psychiatrist or psychological opinion. Similarly, a party may offer the in-court testimony of a witness even though this testimony may be influenced or "tainted" by this person's prior exposure to such interrogation.

The courts have been most reluctant to admit such statements or testimony. In the first case to raise the issue, a California court stated in 1897 that "the law of the United States does not recognize hypnotism." Since then the courts nearly always have excluded statements made under hypnosis or narcoanalysis, regardless of whether these statements are offered as substantive evidence or as bearing on credibility. Post-hypnotic testimony as to recollections enhanced or evoked under hypnosis has produced more divergent holdings. A few courts have said that such testimony is generally admissible, with objections as to its accuracy bearing on the weight that the finder of fact should give it. But even in these

jurisdictions there is a trend toward insisting that rigorous safeguards be observed before the hypnotically refreshed memories are admissible. The more prevalent view is that testimony about the posthypnotic memories is inadmissible. Typically, the courts adopting a strict exclusionary rule rely on the *Frye* test of general scientific acceptance, although the same result probably could be reached by inquiring directly into the relative costs and benefits of the testimony. Indeed, the more modern cases support their invocation and application of the general acceptance standard by examining scientific testimony or literature on the value of hypnosis for recovering memories and by referring to the usual concerns with

scientific evidence-its suspected tendency to over-awe the jury and to consume time and resources-in a matter of particular sensitivity.

When an expert uses narcoanalysis or hypnosis in his or her examination of a person to determine whether the individual is insane, incompetent, or mentally incapacitated, the case for admissibility is much stronger. A few courts have excluded expert opinions based on these techniques, but this position seems difficult to defend even under the restrictive general acceptance standard. Most courts recognize that the opinions of the experts may be admitted and that the revelation of the details of what the subject said while under hypnosis or drugs is within the trial judge's discretion. Thus, the trial court

> may permit the expert to give his opinion and an explanation of the information on which the expert relied, but curb the introduction of the statements made under hypnosis or narcoanalysis.

McCormick on Evidence, 3rd Ed. §206 (E. Cleary, ed. 1984) (footnotes omitted).

There is a serious judicial worry with regard to oversuggestiveness in regard to this variety of hypnotically refreshed evidence. *See* the dissent of the Chief Justice in *Rock*, 483 U.S. at 62. Those concerns are especially strong where it is either the police authorities or the prosecution who engage in the process or provide it. Those values are reflected in *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984), as indicated, there is not evidence of either police or prosecutorial involvement in Suzanne's

decision to be hypnotized. A panel of this court carefully examined the standards for admissibility of hypnotically refreshed testimony in *Kimberlin*. *See* 805 F.2d at 240-49. *Kimberlin* presents greater problems for the admissibility of such testimony than does the record in this case. Both *Kimberlin* in this court and Armstrong in the Wisconsin Supreme Court are well within the larger due process tent provided by the majority in *Rock*. This record provides substantial corroboration which is one of the essential ingredients in this entire difficult conceptual mix. The conduct of the state trial court in Wisconsin, the decision of the Court of Appeals of Wisconsin, and the district court in this case do not run afoul of the majority in Rock, and is consistent with *Kimberlin*. Certainly, there was

corroboration and Suzanne was subjected, quite appropriately, to extensive cross-examination by counsel of the appellant.

A pre-*Kimberlin* case in this circuit followed the lead of the Fifth Circuit in *Valdez*. *See United States v. Keplinger*, 776 F.2d 678, 703-705 (7th Cir. 1985). *Keplinger* points to great caution but not a due process *per se* rule in a case where the proffered testimony is offered by the prosecution. That point is driven home by the concurring opinion of Judge Cudahy, *id.* at 254, which is most sensitive to the danger of suggestiveness. He suggested six guidelines for this species of evidence:

> (1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis and aware of its possible effects on memory so as to be able to

aid in the prevention of improper suggestions and confabulation.

(2) The qualified professional conducting the hypnotic session should be independent of either party and should have little investment in the ultimate disposition of the case. The qualified professional should have minimal preconceptions about the case.

(3) Any information given to the hypnotist by either party should be noted in writing so that subsequently the extent of information that the subject received from the hypnotist may be determined.

(4) Before hypnosis, the hypnotist should obtain a detailed description of the facts from the subject, avoiding adding new elements to the subject's description.

(5) The session should be recorded, and preferably videotaped, so that a permanent record is available to ensure against suggestive procedures.

(6) Only the hypnotist and the subject should be present during any phase of the hypnotic session.

Kimberlin, 805 F.2d at 255, fn. 2. While these are not written in constitutional stone they are informative of relevant due process standards.

Since oral argument in this case, the subject of hypnosis has arisen in the precise context of a state criminal conviction being reviewed in a United States district court under 8 U.S.C. § 2254. *Drake v. Clark,* No. 92-1295, slip op. at 1 (7th Cir. Jan. 24, 1994).

In *Drake,* the prosecution's witness, Nancy Ward, had suggested to the police that she be hypnotized to aid her memory,

and the police who were doing the investigation employed the hypnotist. *Id.* The defense objected to Ward's testimony on the ground that she had been hypnotized by the police. *Id.* The trial court ruled that the statement given under hypnosis was inadmissible, but that any testimony recollected independently of the hypnosis was admissible. *Id.* Ward's testimony was strictly limited to the details given in her first statement taken by the police, prior to the hypnosis. *Id.* Indiana found that pre-trial hypnosis of a witness did not affect the admissibility of her statements which had been made before the hypnotism, and were independent of and free of any taint from the statement given under hypnosis. *Drake v. State,* 467 N.E.2d 686 (Ind. 1984). This court agreed, finding that it was not unfair for the trial court to exclude the defense's

attempts to impeach the witness on the ground that she had been hypnotized when the witness did not testify to anything stemming from the hypnotism. *Drake* well supports the reasoning and result here.

It needs to be noted, as indicated in *Drake*, that the state rule in Indiana was before generally described as a *per se* rule. *Drake v. State*, 467 N.E.2d 686 (Ind. 1984); *see also* Thomas M. Flemming, Annotation, Admissibility of Hypnotically Refreshed or Enhanced Testimony, 77 ALR 4th 944; and *Peterson v. State*, 448 N.E.2d 673 (Ind. 1983). The state law of Wisconsin, however, is not so rigid. *See State v. Armstrong*, 110 Wis.2d 555, 329 N.W.2d 386 (1983), *cert. den.*, 461 U.S. 946 (1983). The Wisconsin Supreme Court has concluded that a *per se* ban on hypnotically affected testimony is unwarranted. 329 N.W.2d at 394.

Armstrong holds that a criminal defendant's constitutional right to confront and cross-examine the witnesses against him is protected when the criminal defendant has the opportunity to cross-examine the witnesses against him is protected when the criminal defendant has the opportunity to cross-examine the witness and is permitted to introduce testimony on the witness' pre-hypnosis recollection and on the effect hypnosis can have on memory. *Id.* at 394.

If one might be permitted to write on a totally clean slate with reference to this subject, there would be great appeal of the kind of a *per se* rule enunciated by the Supreme Court of Arkansas in *Rock v. State,* 288 Ark. 566, 708 S.W.2d 78 (1986), paralleling concerns as to suggestiveness in Chief Justice Rehnquist's dissent in *Rock*. However, this court cannot and does

not write on a clean slate in this regard, but is necessarily bound by the basic determination clear from the authorities that the Fourteenth Amendment, or for that matter, no other provision of the Constitution of the United States is the basis for a *per se* exclusionary rule. In the absence of a *per se* exclusionary rule bottomed in the Constitution, there are constitutional values implicit in the introduction of hypnotically refreshed testimony in a criminal trial in a state court. In this case, it was done carefully by a state court judge acting under clear authority from the highest court in that state which found favor with the second highest appellate court in that state. A veteran United States district judge sitting in that state found specifically that the due process clause of the Fourteenth Amendment was not

violated. All of that commands respectful attention here. The obligation remains to examine the record carefully under 28 U.S.C. § 2254 to determine whether there has been a violation of the Constitution, laws or treaties of the United States. Judge Reynolds ruled that there was no such violation, and the record in this case fully supports that ruling. There is no *per se* rule bottomed in the Constitution. There is no violation of the Constitution in the way that this particular item of evidence was admitted on behalf of the prosection in a state court criminal proceeding. Therefore, there is no basis for relief on this issue under § 2254, and the denial of such relief by the district court should be affirmed.

The Confrontation Clause

There is something of a back-handed effort made here to assert that presentation of hypnotically refreshed testimony somehow violates the Confrontation clause of the Sixth Amendment of the Constitution of the United States. That argument was not fully developed before the district court, not fully developed before the state trial court in Wisconsin, and not fully developed before the Court of Appeals of Wisconsin. However, it is a very small piece of this record which caution requires us to address. Our research poses no case in which the admission of hypnotically refreshed testimony has been held to *per se* violate the Confrontation clause of the Sixth Amendment. *See Harker v. Maryland,* 800 F.2d 437, 441-43 (4th Cir. 1986); *McQueen v. Garrison,* 814 F.2d 951, 961-62 (4th Cir. 1987); *cert. den.*,

484 U.S. 944 (1987; *Chaussard v. Fulcomer*, 816 F.2d 925, 929-31 (3d Cir. 1987); *cert. den.*, 484 U.S. 845 (1987); *Beck v. Norris*, 801 F.2d 242, 245 (6th Cir. 1986); *Clay v. Vose*, 771 F.2d 1, 5 (1st Cir. 1985), *cert. den.*, 475 U.S. 1022 (1986).

CONCLUSION

A careful review of the issues considered by the district court conducting the collateral review envisioned under § 2254 fails to disclose any reversible error in regard to the district court's decision denying such relief. That decision is now

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

THOMAS A. BISKUP,

Petitioner,

v. Civil Action No. 91-C-1205

GARY McCAUGHTRY, Warden,
Waupun Correctional Institution,

Respondent.

DECISION AND ORDER

Thomas A. Biskup ("Biskup") was found guilty by a jury of injury by conduct regardless of life, intermediate battery, and five counts of burglary. Presently before the court is Biskup's petition for a writ of habeas corpus filed pursuant to Title 28 United States Code § 2254. Biskup challenges his conviction on five grounds: (1) the trial court erred when

it refused to sever counts; (2) the trial court erred when it admitted hypnotically "refreshed"[1] testimony; (3) prosecutorial delay; (4) violation of the double jeopardy clause; and (5) insufficiency of the evidence.

On July 18, 1990, the Wisconsin Court of Appeals, District II, affirmed Biskup's conviction. On October 23, 1990, the Wisconsin Supreme Court denied Biskup's petition for review. Biskup has therefore exhausted his state remedies.[2]

FACTS

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[1]Biskup refers to the testimony as hypnotically "induced"; respondent refers to the testimony as hypnotically "refreshed." For simplicity, this court will use the word refreshed.

[2] While the state initially acknowledged in its answer to Biskup's petition that Biskup exhausted his state remedies regarding all grounds for relief, the state subsequently argues that Biskup did not raise the constitutional issue with respect to the hypnotically induced testimony. See Mar. 31, 1992 Br. at 9-11. This court is not persuaded by the state's argument.

Biskup and his wife, Suzanne, were married on January 22, 1983. They had one daughter, Lynn, together. On April 7, 1984, Suzanne was hit by a car driven by a friend of Biskup, Craig Kolz ("Kolz"), and is now paralyzed from the chest down. Biskup and Suzanne tell differing stories as to what happened that day.

Suzanne's Testimony

At Biskup's trial, Suzanne testified that her marriage to Biskup had deteriorated "beyond repair" (Tr. 1 at 146),[3] and that she was planning on leaving the next week with Lynn during a work vacation and not coming back. (Id. 147.) On the morning of April 7, she and Biskup drove to a wooded area where she told Biskup she wanted a divorce and custody of Lynn. (Id. at 148.) She told

[3] The number following "Tr." indicates which day of trial the transcript is from.

Biskup she wanted a divorce because she no longer wanted to live in his parents' house.[4] (Id. at 198-199.) When Biskup said he wouldn't give her custody of Lynn, Suzanne threatened to turn him in for burglaries he had committed. (Id. at 148-149.) Biskup stated that she wouldn't follow through on her threat because she was also involved in some of the burglaries.[5] (Id. at 150.)

Later that day, Kolz worked with Biskup on a lawn mower in the Biskup garage. (Id. at 205.) Afterward, Biskup, Suzanne, and Kolz played scrabble and drank wine. (Id. at 205-206.) Around 7:00, Suzanne took a nap. (Id. at 177.)

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[4] Biskup states that they were actively looking for homes, and that he had made an offer on a house which was accepted. (Tr. 4 at 34.) Suzanne denies that Biskup was making serious attempts to purchase a house. (Tr. 1 at 201.)

[5] Suzanne first told the police about the burglaries in August 1984. (Id. at 176.)

Biskup woke her up around 9:00 to go to Burger King. (Id.) Suzanne initially declined because she was tired, but then gave in. (Id. at 178.) On the ride home, Biskup got out twice to check the truck, because he said it did not feel right. (Id. at 179-180.) Suzanne did not notice anything wrong with the truck. (Id.) When Biskup got back into the truck the second time, Suzanne heard a loud hissing sound. (Id. at 180.) Biskup said the tire looked like it was going flat, but that he would try to go farther. (Id. at 181). He drove fifty feet before he had to pull over because the truck was shaking. (Id.) The two began walking along a two-lane gravel highway. (Id. at 183-184.) They stopped a number of times because Biskup, who has asthma, was having trouble breathing. (Id. at 184.) Suzanne

and Biskup began talking and then arguing about Lynn. (Id. at 185).

Suzanne moved to walk in front of Biskup, and he pushed her in the shoulder. (Id.) Suzanne began trotting away, and Biskup caught up with her and pushed her. (Id.) The next thing Suzanne remembers if being hurt, laying in a ditch, and then being at a hospital. (Id. at 185-186.) Suzanne was not fully conscious the first few days in the hospital. (Id. at 186.) Suzanne was not fully conscious the first few days in the hospital. (Id. at 186.) She was in the hospital for four months. (Id.)

Biskup's Testimony

Biskup testified at trial that on the morning of April 7, he and Suzanne went shopping and returned home around noon. (Tr. 4 at 33.) He denies going to a wooded area with Suzanne (Id.), and denies

that Suzanne threatened to turn him in for the burglaries. (Id. at 88.) Biskup also denies that he told Kolz that Suzanne wanted a divorce on April 7. (Tr. 4 at 107.) Soon after they returned home, Kolz stopped by for a short time. (Id. at 35.) Kolz returned a few hours later, they worked in the garage, and the three played Scrabble and drank wine. (Id. at 36-37). Kolz eventually left, Suzanne lay down, and Biskup watched television. (Id. at 38.)

Later, he and Suzanne went to Burger King. (Id. at 39.) On the drive home, the truck started to vibrate, and Biskup pulled over to check the truck twice. (Id. at 40-41.) The second time, he told Suzanne they had a flat tire, and they

walked towards home.[6] (Id. at 44.) The two were talking and laughing. (Id. at 45.) There was a loud bang and a cloud of dust, and Suzanne disappeared. (Id. at 46-47.) Biskup ran for help (Id. at 47), shouting that a white car hit Suzanne.[7] (Id. at 110-111.) The first building he came to was a bar, where a small crowd apparently had gathered because of the accident. A woman there told Biskup that his wife was hurt and that he would not want to see her. (Id. at 48.) Biskup spoke to the police, went to a hospital to be checked out, picked up his truck, and then went home. (Id. at 49-53.) Biskup saw Suzanne the next day. (Id. at 56.)

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[6] There was construction around the Burger King. (Tr. 1 at 178.) Biskup speculates that the flat tire was caused by three nails picked up when he drove over some boards at the construction cite. (Tr. 4 at 109-110.)

[7] Kolz's car was a black Monte Carlo.

A few months after the accident, Suzanne began to get "cold" towards Biskup. (Id. at 60-61.) Biskup filed for divorce in July, 1984, because he found out from a nurse at the hospital that Suzanne was going to file for divorce. (Id. at 63-64.)

Kolz's Testimony

Kolz was charged with a hit and run, which charge was later dismissed, and he was granted immunity. (Tr. 2 at 5-6, 30-31.) Kolz testified that Biskup asked him to hit Suzanne with his car. (Id. at 5.) At trial, Kolz explained that on April 7, he initially went to the Biskup house around noon to work on a lawn mower. (Id. at 8-9.) Kolz left and returned around five. (Id. at 9.) At that time, Biskup told him Suzanne wanted a divorce, and that he would not let her have custody of Lynn. (Id. at 10-11.) Biskup also told

Kolz that Suzanne had threatened to turn him in for burglary. (Tr. 2 at 11.) Biskup then told Kolz that he wanted to do something to change Suzanne's mind about the divorce.[8] (Id. at 12.)

Biskup told Kolz that he would take Suzanne out to dinner, get a flat tire, walk for help, and that Kolz should hit Suzanne with his car. (Id. at 12-13.) Biskup offered Kolz $12,000 of his aunt's inheritance and a car. (Id. at 13.) During cross-examination, inconsistencies in Kolz's explanation regarding the money were brought out. (Id. at 39-40.)

Kolz did not agree to the plan at first, but Biskup kept asking him. (Id. at 13-15.) Before Kolz left, Biskup again

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[8] Biskup told an acquaintance during the divorce that he would do whatever he had to do to get custody of Lynn, including cutting Suzanne's [automobile's] brake line. (Tr. 4 at 153-154.) Biskup states that he does not recall making such statements. (Id. at 108-109.)

said to nick Suzanne with the car. (Id. at 16.) Kolz left, parked by the road Biskup would be travelling on, drank a quart of beer, and waited for Biskup's truck to go by. (Id. at 17.) Kolz was drunk. (Id. at 32.) Kolz then drove, saw Biskup's parked truck, and passed Biskup and Suzanne, who were walking along the road. (Id. at 17-18.) Kolz turned around up the road, and hit Suzanne while he was driving forty to forty-five miles an hour. (Id. at 18-19.)

ANALYSIS

Severance and Joinder of Charges

Biskup alleges that he was improperly tried on both the injury and burglary counts in one trial. Biskup asserts that because he had to defend against twelve counts, there was a danger of cumulation and confusion, and that it was difficult for the jury to reasonably and

dispassionately review the burglary evidence.

Whether to sever charges is a matter left to the trial court's discretion; there is no error unless the trial is unfair and violates due process. Willard v. Pearson, 823 F.2d 1141, 1149 (7th Cir. 1987.) To show that he has been denied his right to a fair trial, Biskup must show that the prejudice was sufficient to warrant relief under Rule 14 of the Federal Rules of Criminal Procedure or its state counterpart. Id. There is no prejudice requiring severance if evidence on the severed count would be admissible in the trial of the remaining counts. United States v. Rodgers, 475 F.2d 821, 828 (7th Cir. 1973. Biskup does not specifically explain why the jury was prevented from arriving at a proper verdict; nor does he discuss the state's

argument that evidence on the burglary counts would be admissible on a trial of only the injury counts.

Wisconsin Statute § 971.12(1) states that offenses may be joined if they are based on "2 or more acts or transactions connected together or constituting parts of a common scheme or plan." The statute is construed broadly in favor of joinder. Francis v. State, 86 Wis.2d 554, 558-559, 273 N.W.2d 310 (1979). Joinder is proper if one crime is committed to avoid liability of another. State v. Bettinger, 100 Wis. 2d 691, 698, 303 N.W.2d 585, 589 (1981). Improper joinder constitutes a federal constitutional violation only if the prejudice was so great as to deny Biskup a fair trial. Leach v. Kolb, 911 F.2d 1249, 1258 (7th Cir.), cert. denied, 498 U.S. 972 (1990).

The state's theory was that the property crimes are the motive for the assault on Suzanne, and that the assault demonstrates a consciousness of guilt of the property crimes. (July 1, 1988 Tr. at 20-21.) The trial court ruled that Biskup had not made a sufficient showing of prejudice. (Id. at 35.)

This court finds that Biskup has not alleged specific prejudice so great as to deny him a fair trial; the trial court therefore did not abuse its discretion when it refused to sever, but rather joined, the injury and burglary counts.

Hypnotically "Refreshed" Testimony

Suzanne was hypnotized in May 1985 by a social worker trained in the use of hypnosis. (Mar. 14, 1989 Tr. at 24.) Suzanne decided on her own to be hypnotized because she felt she did not remember the entire accident. (Id. at 8.)

Until she was hypnotized, Suzanne did not remember arguing about Lynn, Biskup shoving her, hearing gravel crunch, and seeing lights. (Tr. 1 at 186-187; Mar. 14, 1989 Tr. at 9.)

Biskup contends that Suzanne's testimony regarding being pushed by Biskup was crucial to the prosecution, and was extremely prejudicial. Further, Kolz's testimony alone would not have been enough.[9]

Biskup argues that the guidelines set forth in State v. Armstrong, 110 Wis.2d

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[9] Biskup argues that two men in the area of the accident heard talking and laughing; they did not hear arguing or see pushing. The questions asked of Detective Ladwig at a motion hearing, however, were whether these two men said anything to him regarding arguing, running, and pushing. (Mar. 14, 1989 Tr. at 54-55.) The trial court noted that the two men would not have paid much attention to what was occurring on the road. (Apr. 19, 1989 Tr. at 18.) This court's review of the transcripts does not find that Biskup brought out this information for the jury. Biskup cites to a transcript of motions (the above March citation) and a citation in the trial transcript which is not correct.

555, 571-572 n.23, 329 N.W.2d 386, cert. denied, 461 U.S. 946 (1983), regarding whether a hypnotic session was unduly suggestive, were not followed. Thus, he argues, the evidence was improperly admitted and there was a constitutional violation.[10]

The trial court noted that Armstrong sets forth guidelines, and that failure to comply does not mandate exclusion (Mar. 14, 1989 Tr. at 87); Armstrong, 110 Wis.2d at 571-572, n.23. The trial court found that while not all the guidelines were literally met, the "spirit" of the guidelines was met. (Mar. 14, 1989 Tr. at 87-88.) The trial court noted that "the

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[10] Biskup also argues that United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984) directs that Suzanne's testimony should not have been allowed. In Valdez, a witness could not identify a person, who the witness knew was under suspicion, prior to being hypnotized; also, an FBI agent questioned the witness under hypnosis. This court does not agree that Valdez is analogous to the present action.

testimony of Ms. Biskup squared with the facts, especially about the push, especially about the clogs that were left in the road where that push no doubt did occur,"[11] and concluded that "I frankly find nothing so suggestive in this record which would bar the testimony of Ms. Biskup['s] post-hypnotic trance...." (Apr. 19, 1989 Tr. at 18-19; Mar. 14, 1989 Tr. at 89-90.)

While Biskup asserts the "push" evidence was crucial, his attorney, during post-trial motions, acknowledged that "the verdict reflects -- could reflect either that they [the jury] found there was a push or that they found there wasn't a push...." (Apr. 19, 1989 Tr. at 16.)

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[11] The state brought out evidence that the position of Suzanne's clogs after the accident corroborated the theory that she was pushed. Biskup recognizes this fact, but does not discuss it in his reply brief.

A trial court's ruling on admissibility of evidence is error only if it abused its discretion. United States v. Miller, 984 F.2d 201, 203 (7th Cir. 1993). As discussed above, there was other evidence of Biskup's plan to "nick" Suzanne, including Suzanne's other testimony, Kolz's testimony, and the position of Suzanne's clogs. The jury personally viewed the prosecution witnesses and Biskup, and made credibility judgments. Therefore, the trial court did not abuse its discretion and Biskup has not demonstrated that his trial was unfair.

Prosecutorial Delay

The information alleged that Biskup committed four burglaries in 1982. The charges regarding burglary were made in March 1988, within the six-year statute of limitations. Nevertheless, Biskup argues

that he suffered actual prejudice as a result of the delay, in violation of his due process rights. United States v. Marion, 404 U.S. 307 (1971).

Biskup must show that he suffered actual prejudice and that the delay was a deliberate device to gain advantage over him. United States v. Gouveia, 467 U.S. 180, 192 (1984). Biskup argues that evidence in his defense was lost because of the passage of time. He states that family calendars which detailed his whereabouts, including the exact time when he left and returned home, had been destroyed. (May 12, 1989 Tr. at 7-9, 11-12.) His aunt, who would have been able to verify his whereabouts, died. (Id. at 9-10.) Additionally, he was unable to locate co-workers who could have provided alibis. (Id. at 10-11, 16.) Biskup puts great weight on the trial court's

statement that he "no doubt has some actual prejudice by delay." (June 21, 1989 Decision at 3.) The trial court, however, was contemplating the type of prejudice that typically occurs with the passage of time, but that the legislature has deemed acceptable in establishing the statute of limitations.

The trial court concluded that Biskup's testimony regarding calendars was not credible. (Id. at 4.) A trial court's credibility determinations are given great deference. United States v. Carter, 910 F.2d 1524, 1529 (7th Cir. 1990), cert. denied, 111 S.Ct. 1628 (1991). The trial court properly determined that Biskup did not establish the type of prejudice necessary to constitute a violation of his due process rights.

Biskup also argues that the prosecution of the burglary counts was delayed to gain a tactical advantage over him, citing testimony by investigating detective Ladwig that there was a prosecutable case in summer 1985. The District Attorney testified that the information from Detective Ladwig in 1985 was not sufficient. (May 12, 1989 Tr. at 35-36, 53.) He did not begin to get corroboration of the burglaries Suzanne discussed until March and April 1985 (Id. at 32), and he wanted to prove the burglaries as a motive for the plan to scare Suzanne. (Id. at 71-71.)

The state was not required to prosecute as soon as it believed it had enough evidence to prove Biskup's guilt regarding the burglary charges. United States v. Lovasco, 431 U.S. 783, 792-795 (1977). This court does not agree with

Biskup that the trial court's decision was clearly erroneous.

Double Jeopardy

Biskup was charged with aggravated battery in violation of Wis. Stat. §940.19, and injury by conduct regardless of life in violation of Wis. Stat. § 940.23. Biskup was found guilty of intermediate battery, a lesser-included offense of aggravated battery, Wis. Stat. §940.19(1m), and injury by conduct regardless of life. Biskup argues that both charges arise from a single incident -- Biskup's plan with Kolz to scare Suzanne; thus, he was charged in separate counts with a single offense.

The double jeopardy clause of the Fifth Amendment prevents a sentencing court from punishing more than the legislature intended. Missouri v. Hunter, 459 U.S. 359, 366-368 (1983). Thus, a

court must determine whether the legislature intended each violation to be separate offense. Garrett v. United States, 471 U.S. 773, 778 (1985). The Wisconsin Court of Appeals in this case concluded that the Wisconsin legislature intended to allow punishment for both aggravated battery and injury by conduct regardless of life under certain circumstances. (July 18, 1990 Decision at 14.) This court accepts that finding with respect to state law. Missouri v. Hunter at 368. Biskup does not answer this argument. This court concludes that Biskup's rights regarding double jeopardy were not violated.

Insufficient Evidence

Biskup argues that there was insufficient evidence to convict him of injury by conduct regardless of life. See Wis. Stat. § 940.23. Specifically, Biskup

asserts that there was insufficient evidence that the alleged plan was "imminently dangerous" and that he had a "depraved mind." Biskup states that "Kolz's testimony fails to provide even a scintilla of evidence that the plan, as conceived by Biskup, was inherently or consciously dangerous to Suzanne's life...." (Id. at 34.)

This court reviews the evidence with all reasonable inferences drawn in the light most favorable to the government. United States v. Goines, 988 F.2d 750, 758 (7th Cir. 1993). As the trial court noted, a plan to "nick" a person with a car carries with it the possibility of greater injury, because of the nature of the instrument used to cause the harm.[12]

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[12] Biskup also states that "[n]o reasonable jury could find both that Biskup did not intend to cause great harm to Suzanne [as the jury did not find him guilty of aggravated battery] and that he acted in a manner inherently dangerous to her life

This court concludes that the jury's conviction of injury by conduct regardless of life was not irrational. Id.

IT IS THEREFORE ORDERED that Thomas A. Biskup's petition for a writ of habeas corpus is DENIED and this action is DISMISSED.

Dated at Milwaukee, Wisconsin, this 6 day of July, 1993.

BY THE COURT

John W. Reynolds
Senior Judge

[by finding him guilty of injury by conduct regardless of life]." (Nov. 8, 1991 Br. at 36.) This court does not agree that this conclusion necessarily follows.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

THOMAS A. BISKUP,

JUDGMENT IN A CIVIL CASE

V.

GARY McCAUGHTRY.

CASE NUMBER: 91-C-1205

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition of Thomas A. Biskup for a writ of habeas corpus is denied and this action is hereby DISMISSED.

U.S.Dist.CourtEastDistWisc.

FILED

at _____o'clock _____

SOFRON B. NEDILSKY

JUL 6 1993

July 6, 1993 SOFRON B. NEDILSKY

_____ _____

Date Clerk

Rita Zvers

_____

(By) Deputy Clerk

Supreme Court, U.S.
FILED
FEB 15 1996
CLERK

No. 95-975

In The

Supreme Court of the United States

October Term, 1995

THOMAS A. BISKUP,

Petitioner,

v.

GARY McCAUGHTRY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 95-975

In The

Supreme Court of the United States

October Term, 1995

THOMAS A. BISKUP,

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v.

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts material to consideration of the questions presented that are not set out in the petitioner's statement of the case will be stated as they become relevant in the following argument.

ARGUMENT WHY PETITION FOR CERTIORARI SHOULD BE DENIED

I. This Court Should Not Grant Review Of The Issue Regarding The Admission Of The Hypnotically Refreshed Testimony Because: (1) The Petitioner Has Forfeited His Right To Review Of His Constitutional Claim By His Failure To Present It To The State Courts; (2) The Petitioner Has Not Shown A Split In The Circuits On The Constitutional Issue He Raises.

A. The petitioner has forfeited his right to raise, in this federal habeas corpus proceeding, his contention that the admission of the hypnotically refreshed testimony violated his constitutional rights because that contention was never presented to the state courts.

While the petitioner raised an objection to the admission of the hypnotically refreshed testimony in the state courts, a reading of his pretrial motion seeking exclusion of the evidence (Motion in Limine to Suppress Hypnotically Affected Testimony and Memorandum in Support, Exhibit A in appendix to respondent's brief in opposition to petition for writ of habeas corpus filed in the district court), his oral argument at the hearing held on that motion (Motion hearing tr., March 14, 1989, at 75-85), his posttrial motion seeking a new trial because the testimony was admitted (Motion for New Trial Based Upon Improper Admission of Hypnotically Affected Testimony and Memorandum in Support, Exhibit B in appendix to respondent's brief in opposition to petition for

writ of habeas corpus filed in the district court), his oral argument at the hearing held on that motion (Motion hearing tr., April 19, 1989, at 11-14, 16-17), and his argument regarding the hypnotically refreshed testimony in his brief in the Wisconsin Court of Appeals (petitioner's brief to Wisconsin Court of Appeals, Exhibit C to Answer to Petition For Writ of Habeas Corpus, at 18-27), reveals that he never raised the **federal constitutional** issue he presents to this Court. In all of his state court submissions, the matter was presented purely as a question of **state evidentiary** law.[1]

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[1]In its answer to the petitioner's petition for a writ of habeas corpus, the respondent, in addressing a question distinct from the waiver issue addressed above--i.e., whether there had been exhaustion of state remedies in this case--stated that the "petitioner has previously presented all of the grounds for relief he raises in his petition in this court to the state trial court (which denied them all on the merits), the state court of appeals (which denied them all on the merits), and the state supreme court (which denied review of them). He has, therefore, exhausted his state remedies" (Answer at 3, para. 11). As shown in the paragraph to which this footnote is appended, that assertion was not entirely factually accurate. While the broad issue of the admissibility of the hypnotically refreshed testimony was raised, and raised repeatedly, in the state courts, the specific constitutional claim raised in this federal habeas corpus proceeding was not. In state court, the petitioner never contended that he was denied his constitutional rights when the hypnotically refreshed testimony was admitted. The factual error in the answer did not, however, render invalid the respondent's ultimate legal concession that the petitioner had exhausted his state remedies. "[A]ll claims waived by failing to preserve them in state court are exhausted . . . ." *Wickstrom v. Schardt*, 798 F.2d 268, 270 (7th Cir. 1986). This inaccuracy in the respondent's answer to the habeas corpus petition was called to the district court's attention before it decided this case (*see* respondent's brief in federal district court at 9-10 n.5).

By failing to present the constitutional issue to the state courts, he waived his right to raise it in those courts:

> Wisconsin permits review on appeal of all issues preserved at trial but deems waived all other issues. *Neely v. State*, 97 Wis.2d 38, 292 N.W.2d 859, 869 (1980); *Macklin v. State*, 92 Wis.2d 323, 284 N.W.2d 661 (1979); *Barrera v. Young*, *supra* at 1268. Objections must be made with sufficient particularity or the issue will be deemed waived. *Roach v. Keane*, 73 Wis.2d 524, 243 N.W.2d 508, 515 (1974).

Wickstrom v. Schardt, 798 F.2d 268, 270 (7th Cir. 1986).

The effect of that waiver on this federal habeas corpus proceeding was described by this Court in *Teague v. Lane*, 489 U.S. 288, 297-98 (1989):

> Petitioner candidly admits that he did not raise the *Swain* claim at trial or on direct appeal. Brief for Petitioner 38-39. Because of this failure, petitioner has forfeited review of the claim in the Illinois courts. . . .
>
> . . . .
>
> Under *Wainwright v. Sykes*, 433 U.S. 72, 87-91, 97 S.Ct. 2497, 2506-2509, 53 L.Ed.2d 594 (1977), petitioner is barred from raising the *Swain* claim in a federal habeas corpus proceeding unless he can show cause for the default and prejudice resulting therefrom. See *Engle v. Isaac*, *supra*, 456 U.S., at 113-114, 117, 124-135, 102 S.Ct., at 1564-1565, 1566, 1570-1576 (applying procedural default rule to claim that had never been raised in state court).

Here, the petitioner has not shown, and the respondent does not believe he could show, either cause for the

default or prejudice resulting from it. Therefore, he is barred from raising in this federal habeas corpus proceeding the constitutional issue he does regarding the admission of the hypnotically refreshed testimony.[2]

B. The petitioner has not shown a split in the circuits on the constitutional issue he raises.

The petitioner offers a single reason why this Court should grant review of the issue he raises regarding the admission of the hypnotically refreshed testimony in this case: he asserts that there is "a split in the circuits regarding the criteria for admissibility of hypnotically induced or refreshed testimony" (petition for writ of certiorari at 6; capitalization and underlining deleted). To support that assertion, the petitioner relies primarily on an alleged conflict between the decision of the Seventh Circuit Court of Appeals in this case and the decision of the Fifth Circuit Court of Appeals in *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984).

No conflict exists between the decision in this case and the decision in *Valdez* because the two cases deal with materially distinct issues. In this federal habeas corpus proceeding reviewing a state-court judgment of conviction, the court below was confronted with the question whether the admission of the hypnotically refreshed testimony

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[2]Precisely the same argument as that made above was presented to the federal district court and the federal court of appeals in this case (*see* respondent's brief in district court at 9-11; respondent's brief in court of appeals at 16-18). The district court dismissed it in one sentence: "This court is not persuaded by the state's argument" (decision of district court at 2 n.2; Pet-App. at A-53). The court of appeals did not address the argument.

violated **the petitioner's constitutional rights**. In *Valdez*, which involved a direct appeal from a federal-court judgment of conviction, the court was dealing with the question whether the admission of the hypnotically refreshed testimony at issue violated **the federal rules of evidence**.

In *Valdez*, the court found that the testimony should have been excluded by application of the rules of evidence, in particular, the rule that permits the exclusion of relevant evidence when its probative value is outweighed by the dangers of unfair prejudice, jury confusion, or jury misapprehension. 722 F.2d at 1201. And the *Valdez* court unequivocally recognized that the evidentiary issue it decided is separate and distinct from the constitutional issue presented here when it expressly "assume[d] that the [evidentiary] error [it found] did *not* violate Valdez's constitutional rights." 722 F.2d at 1204 (emphasis supplied).

In this habeas corpus proceeding, the court of appeals applied constitutional principles to determine that no violation of the federal constitution occurred when the hypnotically refreshed testimony was admitted. The court of appeals' decision in this case is thus not in conflict with *Valdez*, which found the hypnotically refreshed testimony at issue in that case inadmissible under the rules of evidence and expressly declined to find any constitutional violation in its admission.

The petitioner suggests that the decision in the present case is "also at odds" with the decisions in *Williams v. Armontrout*, 877 F.2d 1376 (8th Cir. 1989), and *Tuttle v. Utah*, 57 F.3d 879 (10th Cir. 1995) (petition for writ of certiorari at 10). That, too, is not accurate.

Williams involved an in-court identification that was alleged to have been the product of an impermissibly

suggestive identification procedure conducted by the police. The identification had been produced after the witness had been hypnotized by a police officer. The case was decided under the well-accepted standards set down by this Court for determining when an identification procedure is impermissibly suggestive and should result in the suppression of an in-court identification resulting from it. 877 F.2d at 1379-80, citing *Neil v. Biggers*, 409 U.S. 188 (1972).

The present case is materially distinguishable in at least two respects. First, no identification procedure is involved. Second, as the court of appeals pointed out in its decision in this case, the witness

> independently decided to undergo hypnosis in an effort to recall more clearly the events surrounding the accident. There is no evidence that that decision was prosecutorially induced.

Biskup v. McCaughtry, 20 F.3d 245, 251 (7th Cir. 1994) (Pet-App. at A-29 to A-30).

Thus, the standards that govern the admissibility of identifications resulting from impermissibly suggestive police procedures, upon which the court relied in *Williams*, are not applicable here. Consequently, there can be no conflict between this case and *Williams*.

There is even less substance to any claim that this case is in conflict with *Tuttle*, for the court in *Tuttle* expressly refrained from determining whether the hypnotically enhanced testimony at issue was admitted in violation of the defendant's constitutional rights. Rather, it simply "assume[d]" that constitutional error occurred, as a prelude to disposing of the case on the ground that, if constitutional error occurred, it was harmless. 57 F.3d at 883, 892.

In sum, the petitioner has not shown that the Seventh Circuit Court of Appeals' decision in this case is in conflict with any decision in other circuits. And, apart from the alleged conflict with *Valdez*, *Williams*, and *Tuttle*, the petitioner has made no other argument supporting his request for review. In particular, he makes no claim that the constitutional principles applied by the court of appeals in this case were somehow inconsistent with the decisions of this Court.

Since the alleged conflict that is the only ground upon which the petitioner predicates his request for review has been shown not to exist, it follows that review of this issue should be denied.

II. This Court Should Not Grant Review Of The Issue Regarding The Sufficiency Of The Evidence To Support The Petitioner's Conviction Because: (1) It Simply Presents A Mine-Run Question Of Evidentiary Sufficiency That In No Way Implicates This Court's Function As Law Developer And Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance.

A. The sufficiency-of-the-evidence-to-convict issue that the petitioner raises simply presents a mine-run question that in no way implicates this Court's function as law developer and harmonizer.

As the "Considerations Governing Review on Certiorari" set out in Rule 10 of this Court's rules make manifest, this Court views its primary function as

developing, harmonizing, and assuring consistent application of the law on important federal questions. Review of the issue of the sufficiency of the evidence to support the petitioner's conviction would in no way implicate that function. The constitutional requirement that the evidence must be sufficient to convict, and the standards governing determination of the sufficiency of the evidence to support a conviction, are fully set out in this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979). The only question here is the entirely fact-bound inquiry into whether the specific evidence adduced in this case was sufficient under those standards.

The court of appeals, expressly invoking and applying *Jackson*, concluded that the evidence was sufficient to convict. Review of that fact-specific conclusion would in no way promote the development, harmonization, and consistent application of the law on important constitutional questions. Review of this issue should, therefore, be denied.

B. The petitioner's argument with respect to the sufficiency-of-the-evidence issue is patently without substance.

The petitioner has never denied that the evidence in this case was sufficient to establish, beyond a reasonable doubt, the following facts. The petitioner entered into a conspiracy with his accomplice Kolz by which he asked Kolz to "hit" the victim (the petitioner's wife) with his (Kolz's) 1975 Monte Carlo automobile (Trial tr., Day 2, at 5, 6). As Kolz testified, the petitioner "told me that what he would do is, he would take Suzanne [the victim] into town to have dinner, and then on the way back out of town, I was supposed to hit her with the car" (*id.* at 12). Kolz testified that he was supposed to "just basically nick

her or scare her" (*id.* at 50). In accord with the plan, the petitioner arranged to have the victim walking alongside of the highway, and Kolz, traveling at forty to forty-five miles per hour (*id.* at 19), struck the victim with his car and threw her approximately seventy-four feet (*id.* at 67), resulting in her being paralyzed from the chest down (Trial tr., Day 1, at 144).

The petitioner challenges his conviction of one of the crimes with which he was charged and convicted: injury by conduct regardless of life. Under Wisconsin law, that crime requires that a defendant have engaged in conduct that "evince[d] a depraved mind, regardless of human life." Sec. 940.23, Wis. Stats. (1983). In his petition, the petitioner's challenge to the sufficiency of the evidence is predicated exclusively on the fact that the jury in this case acquitted him of aggravated battery (another crime with which he was charged), thereby implicitly finding that he did not intend to cause great bodily harm. He asserts that "[i]t is impossible to reconcile the jury's finding that the petitioner did not intend to cause great bodily harm to his wife with a finding that his conduct" evinced a depraved mind regardless of life (petition for writ of certiorari at 13).

The short answer to the petitioner's argument is that consistency between verdicts is not required. *See United States v. Powell*, 469 U.S. 57, 58-69 (1984).

The longer answer to the petitioner's argument is that there is no inconsistency between the jury's implicitly finding a lack of intent to cause great bodily harm and its finding the existence of the "depraved mind" element of injury by conduct regardless of life. The Wisconsin Supreme Court has explicitly stated that a "depraved mind has a general intent to do the acts and the consciousness of the nature of the acts and possible result but lacks the

specific intent to do the harm." *State v. Weso*, 60 Wis. 2d 404, 411-12, 210 N.W.2d 442, 446 (1973). Obviously, no intent to do any harm at all, much less an intent to do great bodily harm, is necessary to establish the "depraved mind" element of the offense in question. Even absent the specific intent to cause great bodily harm, the petitioner and Kolz evinced that "utter lack of concern for the life and safety of another" that is the hallmark of a "depraved mind," *see* Wis. JI-Criminal 1110 (1966), when Kolz, driving his 1975 Monte Carlo at a speed of forty to forty-five miles per hour, deliberately struck the victim as the petitioner had directed him to do.

III. This Court Should Not Grant Review Of The Severance Issue Because: (1) Review Of It Would In No Way Implicate This Court's Function As Law Developer And Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance.

A. The severance issue in no way implicates this Court's function as law developer and harmonizer.

As with the previous issue, review of this issue would in no way implicate this Court's function to develop, harmonize, and render consistent the law on important federal questions. It would again require a fact-specific inquiry that would not contribute to the development of the law. For that reason, review of this issue should be denied.

B. The petitioner's argument with respect to the severance issue is patently without substance.

The petitioner contends that he was deprived of due process and a fair trial because the burglary counts with which he was charged were tried together with the injury counts with which he was charged. The Constitution is violated if the trial of joined charges "'results in prejudice so great as to deny a defendant his . . . right to a fair trial.'" *Leach v. Kolb*, 911 F.2d 1249, 1258 (7th Cir. 1990), quoting *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986). Such prejudice, however, cannot be found to exist when evidence of the joined counts would be admissible in separate trials of each of them:

> [P]rejudice requiring severance is not shown if evidence on the severed count would be admissible in the trial of the remaining counts, Drew v. United States, 118 U.S.App.D.C. 11, 331 F.2d 85, 91 (1964).

United States v. Rogers, 475 F.2d 821, 828 (7th Cir. 1973).

Here, the petitioner's argument proceeds from a faulty premise: that "[t]he evidence of burglary charges against the petitioner would not have been admitted separately at the trial of the physical injury to the petitioner's wife" (petition for writ of certiorari at 14). Contrary to the petitioner's assertion, evidence of the burglary counts would have been admissible at a trial of the injury counts because the fact that his wife had threatened to turn him in on the burglaries provided one of the potential motives for the petitioner's commission of the injury crimes against her. *See State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585, 588 (1981); *Peters v. State*, 70 Wis. 2d 22, 30, 233 N.W.2d 420, 425 (1975). Moreover, evidence of the

injury counts would have been admissible at a trial on the burglary counts because the injury crimes evinced a consciousness of guilt on the part of the petitioner in regard to the burglary counts. *See State v. Bettinger*, 100 Wis. 2d at 698, 303 N.W.2d at 588-89; *Peters v. State*, 70 Wis. 2d at 30, 233 N.W.2d at 425.

Thus, under the general rule that there is not sufficient prejudice to a criminal defendant to warrant severance when evidence of each crime would be admissible at a separate trial for the other, there is no basis for finding that severance was required here.

IV. This Court Should Not Grant Review Of The Issue Of Prosecutorial Delay In Charging Because: (1) Review Of It Would In No Way Implicate This Court's Function As Law Developer And Harmonizer; (2) The Petitioner's Argument With Respect To It Is Patently Without Substance.

A. The delay-in-charging issue in no way implicates this Court's function as law developer and harmonizer.

As with the two previous issues, review of this issue would in no way implicate this Court's function to develop, harmonize, and render consistent the law on important federal questions. The law regarding prosecutorial delay in charging is well developed. *See United States v. Gouveia*, 467 U.S. 180 (1984); *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971). Again, what would be required if review were granted here is a wholly fact-bound inquiry that

would not contribute to the development of the law in any substantial way. For that reason, review of this issue should be denied.

B. The petitioner's argument with respect to prosecutorial delay is patently without substance.

This Court has stated that due process is violated if a defendant can prove that the Government's delay in bringing the indictment was "a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *United States v. Gouveia*, 467 U.S. at 192. The petitioner has not established either an intent to gain tactical advantage or actual prejudice.

Intent To Gain Tactical Advantage. The petitioner's contention that the delay in this case was deliberately designed to gain a tactical advantage over him is based on the testimony of Detective Ladwig that, as of the summer of 1985, there was a "prosecutable case" against the petitioner with respect to the burglaries with which he was ultimately charged (Motion to Dismiss Pre-Arrest Delay and Prosecutorial Delay and Affidavit in Support, Exhibit C in appendix to respondent's brief in opposition to petition for writ of habeas corpus filed in district court, at 6-10), but that he "wasn't really pushing" the burglary cases (*id.* at 8) because of the tactical advantages in putting them together with the injury charges (*id.* at 9-10).

The district attorney disputed Ladwig's assertion that a prosecutable case had been put together by the summer of 1985 (Motion hearing tr., May 12, 1989, at 53). The respondent, however, does not believe it is necessary to resolve that dispute. Even assuming that the burglary

charges could have been prosecuted in the summer of 1985, the state's delay in bringing those charges until it could put together its whole case against the petitioner, including the injury counts, did not constitute an improper attempt to "gain a tactical advantage over the petitioner," in the sense that such phrase is used to describe the showing necessary to make out a due process violation.

That is clear from this Court's decision in *United States v. Lovasco*. In *Lovasco*, this Court expressly rejected the notion that

> once the Government has assembled sufficient evidence to prove guilt beyond a reasonable doubt, it should be constitutionally required to file charges promptly, even if its investigation of the entire criminal transaction is not complete.

431 U.S. at 792. This Court recognized that

> compelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act.

431 U.S. at 792-93. Among the problems "would be multiple trials involving a single set of facts." 431 U.S. at 793. Under *Lovasco*, the prosecutor in the instant case could certainly delay prosecution of the burglary counts until he was ready to try them together with the injury counts at a single trial. The delay in prosecuting the burglary counts in question was not designed to gain an improper tactical advantage over the petitioner, but rather to permit the state to put its best case together on all of the counts and try them in one trial.

Actual Prejudice. The petitioner alleges that he suffered prejudice because: (1) "potential witnesses had died" and (2) "certain calendars (for an alibi defense) had been lost in the years since the burglaries (1982 and 1983)" (petition for writ of certiorari at 17).

The first allegation is inadequate in light of the following observation of this Court in *United States v. Marion*, 404 U.S. at 325-26:

> Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment.

The second allegation of prejudice has been completely undermined by the state trial court's finding, made as part of its postconviction decision on the petitioner's motion to dismiss for delay in the commencement of the prosecution, that the petitioner's testimony regarding the family calendars and what they would have shown was "basically not credible" (Memorandum Decision on Defendant's Motion to Dismiss for Delay in Prosecution, Exhibit I to Answer to Petition for Writ of Habeas Corpus, at 4). That is a finding of fact that is entitled to a presumption of correctness under 28 U.S.C. § 2254(d).

In short, the petitioner has shown neither improper prosecutorial motive nor actual prejudice. Therefore, no due process violation has been established.

CONCLUSION

For the foregoing reasons, the respondent requests this Court to deny the petitioner's petition for writ of certiorari.

Respectfully submitted,

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